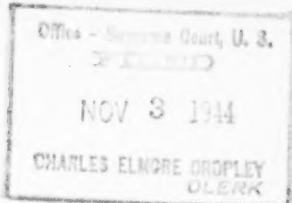




(34)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 98

JOHN W. ROXBOROUGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR REHEARING

CHARLES H. HOUSTON,

GEORGE STONE,

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 98

JOHN W. ROXBOROUGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

**PETITION FOR REHEARING ON PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT
OF MICHIGAN**

Petitioner respectfully requests a rehearing on the Petition for Writ of Certiorari heretofore filed by him, and suggests that further consideration be given to the following reasons for the issuance of the writ:

Statement

Petitioner, a Negro, was convicted in the Circuit Court for Wayne County, Michigan, on a charge of conspiracy to obstruct justice. He and 79 other identified persons were jointly charged with the crime, and petitioner and 64 of these 79 were tried jointly (R. 23).

Under the laws of the State of Michigan, Section 17305, Compiled Laws of 1929, the prosecutor had available to him 5 peremptory challenges for each defendant on trial—a staggering total of 325 such challenges. Each defendant, on the other hand, had but 5 peremptory challenges. The interests of the defendants were diverse and frequently conflicting, even hostile, and they were represented by 16 different lawyers (R. 48), thus effectively precluding any agreement or unified action relating to challenges.

During the selection of the trial jury, which took a period of about 3 weeks, the prosecutor used upwards of 100 of his challenges. All Negroes selected, at least 30 in number, although presumptively qualified, were arbitrarily and peremptorily excluded by the prosecutor's use of this overwhelming advantage of the 325 peremptory challenges at his disposal, on the ground of race prejudice, admitted by the prosecutor, as appears from the Williams affidavit, obtained February 18, 1942, and filed the next day in support of motion for new trial. That affidavit, nowhere controverted or explained by the state, quotes the prosecutor's explanation for his excluding, peremptorily, the 30 Negroes, as (R. 62):

"A. The Roxberrough-Watson interests are so wide that I prefer not to have any Negroes on the jury, and further practically every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters. * * *"

Suspicion that the prosecutor was actuated by racial prejudice in peremptorily challenging every Negro venireman called to serve on the trial jury, could not be verified until the Williams affidavit was obtained on February 18, 1942. It was immediately, in fact on the very next day, filed with the trial court (R. 62) and the objection vehemently pressed. The trial court, after argument, overruled petitioner's contention (R. 73-4).

On appeal to the State Supreme Court, the prejudicial conduct of the prosecutor in his misuse of the 325 peremptory challenges was assigned as error, as an invasion of his constitutional rights, and the point pressed in the briefs. The State Supreme Court took full cognizance of the issue, discussed it at considerable length, but affirmed the action of the trial court. (See Appendix B hereto.)

In due course, petitioner filed application in this court for writ of certiorari to review the affirmance by the State Supreme Court. Application was denied on October 16, 1944. The State Supreme Court, on October 17, 1944, granted petitioner a further stay of proceedings for 30 days, to enable him to file this petition for rehearing. A certified copy of the stay order has been filed with the Clerk of the court, and a copy is inserted herein as Appendix "A".

Reasons

I

There can be no doubt that petitioner's constitutional right to equal protection of the laws as guaranteed by Section 1 of the 14th Amendment was outrageously violated and that he was placed on trial before a jury hand-picked by the prosecutor through the misuse of his reservoir of 325 peremptory challenges to exclude all Negro veniremen solely because of race. Here the traditional function of the peremptory challenge *to exclude* became by cumulative and repetitive use *the power to select*.

Cf. State v. Wilson, 48 N. H. 398, at 399.

Whether or not the constitutional question here involved was properly raised in the trial court (and we claim that it was) is immaterial inasmuch as the Supreme Court of the State of Michigan, the highest court of that State, did consider and decide that question on its merits.**

** See Appendix "B".

See 307 Mich. 575, at pages 588-594.

The action of the State Supreme Court in thus considering and disposing of petitioner's claim of violation of his constitutional rights, amounts to a waiver of petitioner's inartistic presentation of the issue to the trial court, so that he is now entitled to review by this Court.

Home Insurance Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926.

Whitfield v. Ohio, 297 U. S. 431, 80 L. Ed. 778.

The manner in which the objection was presented is immaterial, so long as the State Supreme Court was not misled. Inexpertness in drawing the question does not preclude review of a constitutional right.

Pyle v. Kansas, 317 U. S. 213, 87 L. Ed. 214.

II

The lodging of 325 peremptory challenges in the prosecution, by virtue of Section 17305 of the Compiled Laws of 1929 of the State of Michigan, enabled him to obtain a hand-picked jury from the total panel of 300 veniremen. By the exercise of 100 of those challenges, he succeeded in obtaining a jury of his own choice.

The selection of a trial jury with the participation of the prosecutor has always been condemned because "an impartial trial would seldom occur unless the selection of the jury be impartial."

Peak v. State, 50 N. J. L. 179.

Trial by a jury not impartially selected is a denial of due process and equal protection of law under the Fourteenth Amendment to the Constitution of the United States.

Smith v. Texas, 311 U. S. 126, 85 L. Ed. 84.

Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839.

The case at bar presents the additional important circumstance that the prosecutor used as many of the 325 peremptory challenges as were necessary to strike from the trial jury every Negro called. The Williams affidavit presented to the trial court showed that this action was taken by the prosecutor for the reason that he believed "every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters" (R. 63).

The opinion of the State Supreme Court that this affidavit did not disclose a racially discriminatory purpose on the part of the prosecutor, effectuated by his misuse of the 325 peremptory challenges so generously given to him, is contrary to reason and justice.

See 307 Mich., at page 594.

This Court is not bound by the findings of fact of the State Court where effective review requires that this Court inquire both into the facts and the law.

Norris v. Alabama, 294 U. S. 587, 589-590, 79 L. Ed. 1074.

The Williams affidavit was not contradicted, controverted or explained in any way. The burden of overcoming its accusation was upon the State, and its failure to do so is ground for inference that the accusation was true.

Cf. Hill v. Texas, 316 U. S. 400, 405, 86 L. Ed. 1559.

In the circumstances of this case, the misuse by the prosecutor of the 325 peremptory challenges to discriminate against petitioner's rights, and totally and arbitrarily to exclude every available Negro from the trial jury was a denial to petitioner of due process and equal protection of the law guaranteed to him by the Fourteenth Amendment.

Smith v. Texas, supra.

Carter v. Texas, supra.

The mere fact that the statute authorized the prosecutor to exercise 325 peremptory challenges is insufficient to overcome the constitutional objections. The application and administration of that statute have resulted in the deprivation of petitioner's rights, and are thus equally condemned by the Constitution.

Smith v. Texas, supra.

Moreover, although a state is free to dispense with trial by jury, if it sees fit to do so, it does not follow that it may substitute a jury chosen with the participation of the prosecutor.

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682.

Conclusion

The fundamental principle of the Constitution is that ours shall be a government by law and not by men. Lodging 325 peremptory challenges with the prosecutor, which he can and did use without restraint of law, against 5 peremptory challenges at the disposal of petitioner, *ipso facto*, destroyed that equilibrium which is inherent in our administration of justice as embodied in our constitutional standards of due process and equal protection.

That power, thus given to the prosecutor, becomes doubly abhorrent when misused, as in the present case, to successfully effectuate a discrimination against the Negro race, and infect the trial with race prejudice. Ordinarily, lack of proof might impose an insuperable barrier to relief against this abuse of power by the prosecutor, because he cannot be examined on his reasons for exercising his peremptory challenges. But in this instance, we have the gratuitous confession from the prosecutor's own lips that race prejudice was the ground for his peremptory exclusion of every Negro venireman.

We repeat our position taken in our original petition that the very novelty of the discrimination practiced in this case should lead this court to outlaw it before it becomes established as an effective subterfuge for evading constitutional restraints.

Petitioner respectfully prays that this court reconsider his petition for certiorari, and upon such reconsideration grant the writ.

Respectfully submitted,

CHARLES H. HOUSTON,
615 F Street, N. W.,
Washington 4, D. C.;
GEORGE STONE,
2163 Penobscot Bldg.,
Detroit 26, Michigan,
Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that I am one of the attorneys of record for petitioner in the foregoing petition for rehearing, and that I believe that there is just merit in this case. This petition is presented in good faith, and not for delay.

CHARLES H. HOUSTON.

APPENDIX "A"

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventeenth day of October, in the year of our Lord one thousand nine hundred and forty-four.

Present the Honorable Walter H. North, Chief Justice; Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Associate Justices.

42085

THE PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*,
vs.

JOHN W. ROXBOROUGH, *Defendant*

In this cause a petition is filed for the allowance of an order staying proceedings, and due consideration thereof having been had by the Court, It is ordered that all proceedings in said cause be stayed for a period of thirty days from and after this date to enable defendant to file a petition for rehearing in the United States Supreme Court in connection with his application for a writ of certiorari.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of October, in the year of our Lord one thousand nine hundred and forty-four.

JAY MERTZ,
Clerk.

[SEAL.]

APPENDIX "B"

The State Supreme Court, in its opinion, said, 307 Mich., at 588:

"The next question raised by Roxborough is stated as follows:

'Where the prosecution excludes from a trial jury, solely because of race, every Negro selected, has a Negro defendant been deprived of due process and equal protection of the laws?'

"Because of the importance of this question, we quote *in extenso* from appellant's brief as follows: * * *"

(4759)